Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of The United States

October Term, 1997

PEACE & LOVE, INC., an Oklahoma Corporation;
ROB BOULDEN; COLIN BRAUMILLER;
and ALLEN S. BRAUMILLER, individuals,

Petitioners,

vs.

KEITH MARSHALL, d/b/a
R. K. MARSHALL CONSTRUCTION,

Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the procedures utilized by the courts of Oklahoma deprived petitioners of procedural due process of law under the Fourteenth Amendment to the Constitution of the United States.

Whether the refusal of the courts of Oklahoma to provide petitioners with the protections afforded by state statutes and common law denied them equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

Whether the overall state adjudicative actions arbitrarily deprived petitioners of constitutionally protected property rights in violations of substantive due process under the Fourteenth Amendment to the Constitution of the United States.

Whether the actions of the Oklahoma courts deprived the petitioners of valuable federal or state-created property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

Peace and Love, Inc. is a corporation organized and operating under the laws of the state of Oklahoma with its registered office and principal place of business in Tulsa, Oklahoma. Rob Boulden and Colin Braumiller are the sole shareholders of the corporation. There is no parent company or subsidiary company.

Rob Boulden is Vice President of Peace & Love, Inc. and one of the two stockholders in the corporation, who lives in Stillwater, Oklahoma.

Colin Braumiller is a resident of Tulsa, Oklahoma, President of Peace & Love, Inc., and one of the two stockholders in the corporation.

Allen S. Braumiller is an oil company executive residing in Tulsa, Oklahoma, and the father of Colin Braumiller. He was not an organizer, officer, shareholder, director, or employee of Peace & Love, Inc. He was a creditor of the corporation and a guarantor on the corporation's business loan obtained from Bancfirst of Stillwater, Oklahoma.

Keith Marshall, d/b/a R. K. Marshall Construction is a resident of Stillwater, Payne County, Oklahoma engaged in the business of residential and commercial construction and remodeling.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Peace & Love, Inc., an Oklahoma Corporation; Rob Boulden; Colin Braumiller; and Allen S. Braumiller, individuals, respectfully petition this Honorable Court for a writ of certiorari.

OPINIONS BELOW

The order of the Supreme Court of the State of Oklahoma dated November 13, 1997 was not published and is reprinted as Exhibit A in the Appendix to this Certiorari Petition. The opinion of the Court of Civil Appeals of the State of Oklahoma, Division I, denying rehearing in this case was filed September 9, 1997, and is reprinted as Exhibit B in

the Appendix to this Petition. The July 23, 1997 opinion of the Court of Civil Appeals of the State of Oklahoma, Division I, was not published and is reprinted as Exhibit C in the Appendix to this Certiorari Petition. The opinion of the District Court for Payne County, Oklahoma was not published and is reprinted as Exhibit D to the Appendix to this Certiorari Petition.

JURISDICTION

The decision of the Supreme Court of the State of Oklahoma was entered on November 13, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Constitutional and Statutory Provisions:

1. The Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV, § 1, which provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article 2, § 7 of the Constitution of the State of Oklahoma:

> No person shall be deprived of life, liberty, or property, without due process of law.

3. Article 2, § 6 of the Constitution of the State of Oklahoma provides the following:

> The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

4. The Oklahoma Statute of Frauds, Okla. Stat. Ann. tit. 15, § 136 (West 1996) is involved, specifically, § 136(2). Section 136(2) reads as follows:

> The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:
>
> 2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in the article on guaranty.

5. The Oklahoma Guaranty Statute, Okla. Stat. Ann. tit. 15, §§ 321-344 (West 1993). Specifically, § 324, which reads as follows:

> Except as prescribed by the next section, a guaranty must be in writing, and signed by the guarantor, but the writing need not express a consideration.

And, § 323, which reads as follows:

> Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms, with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

6. The Oklahoma General Corporation Act, Okla. Stat. Ann. tit. 18, §§ 1001-1144 (West 1986), specifically, § 1006(B)(6), which reads:

> B. In addition to the matters required to be set forth in the certificate of incorporation pursuant to the provisions of subsection A of this section, the certificate of incorporation may also contain any or all of the following matters:
>
> 6. A provision imposing personal liability for the debts of the corporation on its shareholders or members to a specified

> extent and upon specified conditions; otherwise, the shareholders or members of a corporation shall not be personally liable for the payment of the corporation's debts, except as they may be liable by reason of their own conduct or acts;

STATEMENT OF THE CASE

This is a case for the collection of an alleged debt arising out of oral contracts between Keith Marshall, d/b/a/ Marshall Construction (Marshall) and Peace & Love, Inc. (the Corporation) for the remodeling of a commercial building leased by the Corporation in Stillwater, Oklahoma.

Stillwater, the County Seat of Payne County, Oklahoma, is a college town whose biggest industry by far is the 20,000-member student body of Oklahoma State University (OSU). There is an understandable tension between the local population and outsiders who come there to study or work.

The Corporation leased a building adjacent to the campus of OSU on April 28, 1993, for the purpose of opening and operating two dance clubs geared to the student body at OSU. The lease agreement was signed by Colin Braumiller (C. Braumiller) in his capacity as President of the Corporation, and by Rob Boulden (Boulden) in his capacity as Vice-President of the Corporation. Boulden and C. Braumiller are the sole shareholders and directors of the Corporation. In the pretrial to this lawsuit all parties stipulated that the Corporation was a valid entity in good standing. (R. at 140-146, Pre-trial Order). Signs were immediately placed in all the windows and doors of the building notifying the public that the Corporation would be opening dance clubs upon completion of renovations. The Corporation applied for and obtained financing from Bancfirst of Stillwater, Oklahoma. In addition, Allen S. Braumiller (A. Braumiller), of Tulsa, Oklahoma, the father of C. Braumiller, provided financing to the Corporation, gave advice to the

officers of the Corporation, and acted as a written guarantor on the Corporation's loan from Bancfirst.

Based upon the recommendation of the owner of the building, the Corporation, acting through its officer, C. Braumiller, contacted Marshall about repairing and remodeling the building. Marshall and the Corporation officers met at the building on July 10, 1993, where they walked through the site, pointed out the needed work, and the necessity of having all work completed before September 1, 1993, the start of the fall semester at OSU. The officers told Marshall they had a repair list in Tulsa, Oklahoma, prepared by a Tulsa contractor that they would fax to him. The list was faxed to Marshall on July 11, 1993, from the Tulsa office of A. Braumiller.

On July 22, 1993, A. Braumiller placed a long distance telephone call to Marshall in Stillwater, Oklahoma, at the request of Boulden and C. Braumiller. Marshall was asked to pick five things from the faxed list to get the clubs open. On July 23, 1993, Marshall orally bid $5,560.00. The bid was accepted and Marshall began work on July 28, 1993. Marshall was told that the work was for the Corporation.

Marshall's invoice for this initial work was addressed to the Corporation (as were all invoices) and delivered to Boulden around August 20, 1993. The bill totaled $7,779.00 and reflected that Marshall had not completed the five items requested, but had done other work ordered by the officers of the Corporation. Boulden paid Marshall $3,000.00 -- the balance was paid August 31, 1993, by check signed by C. Braumiller.

The projects were not completed in early September. Marshall's company worked at the building site continually from July 28, 1993 to October 15, 1993, except for a two-week period in August when work was halted because the clubs' beer licenses were denied. During that time, numerous remodeling jobs were agreed to between Marshall and the Corporation's officers who were at the property daily or weekly. In addition, much of the work had to be redone.

Marshall's prepared narrative of events, which was a trial exhibit states the following: "All work done was due to a direct order by either Colin [Braumiller] or Rob [Boulden]. At no time was [sic] any changes or additions made on either club by me or my personnel without the consent of either Rob or Colin."

Marshall and A. Braumiller met on only one occasion -- September 13, 1993, when both were guests at the Corporation's meeting. They did communicate via long distance telephone from time to time when Marshall could not reach the corporate officers by telephone. In particular, Marshall phoned A. Braumiller inquiring about payments on September 29, 1993, and October 1, 1993. In response, A. Braumiller, as a creditor of the Corporation, mailed personal checks in the total amount of $17,000.00 to Marshall, clearly indicating on the face of the checks that they were loans to the Corporation.

Upon completion of the projects, Marshall submitted an invoice to the Corporation showing an additional balance owed of $53,549.17. When the Corporation did not immediately pay, Marshall mailed a copy to A. Braumiller requesting payment. A. Braumiller responded in a letter dated November 16, 1993, in part as follows:

> My position is that of a well-wishing father, and lender/co-signer for a partner of the Company, only. I have no ownership or interest, but I will "guarantee" reasonable payment of reasonable charges if the Company fails to pay you as I have suggested above.

The bill remained in controversy prompting Marshall to again write A. Braumiller in January of 1994. A. Braumiller responded in part as follows:

> Thanks for your letter of January 13, 1994. . . . When I assured you that I would see that you were paid, I based such verbal assurance on your verbal estimate of a total of $18,000 for the remodeling

> job. . . . . I continue in my intention to see that you are fairly compensated by P&L, but it was never my intention to guarantee repetitious payment for unsatisfactory work, nor was my verbal agreement to back P&L's credit in this matter ever to have been considered to have been unlimited, or to have gone beyond the $36,000 verbal estimate. . . . If eventually there are unpaid amounts, which I can understand and which you feel I have guaranteed, then please contact me at that time.

The Pleadings And Pretrial. On May 23, 1994, Marshall filed suit in Stillwater, Oklahoma. His verified petition alleged that the remodeling contracts were with the Corporation or in the alternative with Boulden and C. Braumiller as individuals, and that A. Braumiller collaterally and orally agreed to act as guarantor on the projects. The Corporation, Boulden, and C. Braumiller, counterclaimed, alleging that Marshall failed to perform in a timely and workmanlike manner.

A. Braumiller filed a motion together with brief for summary judgment. (R. at 100-113). The motion was based upon the verified petition of Marshall and his sworn testimony in interrogatories, depositions, and admissions that all contracts of whatever nature were oral; that under Oklahoma law a contract of guaranty must be expressed in writing; that an oral guarantee is not valid and enforceable; and that a later executed writing must exhibit a distinct consideration (Marshall failed to ever allege there was any consideration nor was there an allegation of an acceptance by Marshall of an offer of guarantee). Okla. Stat. Ann. tit. 15, §§ 323-324 (West 1993). Marshall responded in part by amending his petition without leave of court, omitting his claim against A. Braumiller as a guarantor, but alleging that A. Braumiller was a maker on the contract. (R. at 126-127). The trial court denied A. Braumiller's motion for summary judgment and struck Marshall's amended petition. (R. at 393).

A pretrial order was entered on May 22, 1995, setting out only the theories proposed by Marshall in his original petition. However, the court granted Marshall permission to amend his petition. On June 2, 1995, Marshall amended to allege only that all defendants were parties to the oral construction agreements. That amended petition failed to allege any facts or circumstances to permit disregarding the corporate entity as required under Oklahoma law. (Appendix at a23-a24). A. Braumiller again moved for summary judgment maintaining that the evidence overwhelmingly showed he was not a contracting party. His motion was denied without hearing.

The Trial. The case was tried to a jury August 21, 22, and 23, 1995. Although the defendants paid the statutory fee to have a court reporter record the trial, no record was made of the voir dire, the court's introduction of the parties to the jury, or early trial motions. From the beginning of the trial the reporter was present in the courtroom where she was to record the proceedings by shorthand. However, because she was positioned behind a desk that shielded her hands from view, the defense attorney had no way of knowing that she was not recording. When he suspected that the case was not being recorded, he asked the court, "Your honor, is this not being on the record?" The court responded, "This is on the record", but did not advise him that all previous matters had been unrecorded. (Tr. Trans. v. I at 3). The lack of a record made it impossible for the defendants to appeal the court's rulings on voir dire and early motions. During the unrecorded period the court made it clear to the jury that the defendants and their attorney were from out of town while Marshall and his attorney were local.

Based upon the court's ruling as set out below, A. Braumiller believed that the trial was proceeding upon the theory that all defendants were parties to the oral construction agreements. The court's discussion of this issue was so ambiguous and arbitrary that A. Braumiller was placed in the position of having to proceed without notice as to the nature

of Marshall's case against him. The relevant portion of the transcript reads as follows:

> **Attorney for Defendants**: The defendants would also like to enter a, I guess it would be a standing objection at this time for anything further in this matter having to do with the guarantor status of the defendant, Allen Braumiller, due to the fact that the petition was amended and we responded to that petition which alleged that he was a party to the contract. And we would just like to, rather than interrupting the proceedings, advise the Court that we object to any evidence being put on of him being a guarantor
>
> **The Court:** Yes, Your objection, exception to that is noted, Mr. Holtmann. And the pre-trial order is amended to reflect the allegations of the amended pleadings to the effect that plaintiff claims that defendant Allen Braumiller is a party to the contract as well as a guarantor. And to reflect the claims, the counterclaims of the defendants as against plaintiff. And it's amended to reflect plaintiff's denial of the counterclaims.
>
> **Attorney for Defendants**: Am I to understand, Your Honor, that the amended petition alleges that Mr. Braumiller, Allen Braumiller is a guarantor and a party?
>
> **The Court**: The amended petition is what it states itself to be.
>
> **Attorney for Defendants**: I'm not trying to belabor this, Judge. The amended petition states Mr. Braumiller is a contracting party. And is it the court's ruling that the pre-trial order will say he is a contracting party and a guarantor?

> **The Court**: The pre-trial order will reflect that plaintiff claims in its amended petition that he is a contracting party.

(Tr. Trans. v. I at 4-6). (No written amendment to the pre-trial order was ever prepared or submitted.)

In spite of the above ruling by the trial court and A. Braumiller's objection to any matter having to do with his status as a guarantor, Marshall was permitted to introduce two letters of A. Braumiller in support of the proposition that he was a guarantor on the contracts. Additionally, instructions on guaranty (although incomplete) were given to the jury.

Marshall failed to plead or introduce any evidence throughout the trial that the Corporation was engaged in a scheme to perpetrate fraud or that it was a mere instrumentality of some individual. These elements are required by Oklahoma law (as a matter of law to be specifically determined by the Court) in order to obtain a judgment to pierce the corporate veil and take the property of the stockholders.

Boulden and C. Braumiller moved for dismissal on the grounds that they were acting as officers of the Corporation and that Marshall failed to meet his burden of proof to pierce the corporate veil. A. Braumiller moved to dismiss upon the grounds that Marshall failed to demonstrate a prima facia case. Both motions were denied.

After being sent out **three times**, the jury returned a general verdict, which the court instructed required proof by only a preponderance of the evidence, against Boulden, C. Braumiller, and A. Braumiller in the amount of $45,338.38. The jury found in favor of Marshall on the counterclaims. No verdict was returned in Marshall's claim against the Corporation – exception was made by the Corporation. The verdict against A. Braumiller failed to indicate whether it was based upon his position as a guarantor or a contracting party, thus extinguishing his valuable property right under Oklahoma law to proceed against the principals (Corporation,

C. Braumiller, and Boulden) for full recovery. *Apache Lanes, Inc. v. National Educators Life Ins. Co., Okl.*, 529 P.2d 984, 986 (Okla. 1974), *appeal after remand* 555 P.2d 600.

Post Trial. In post trial motions on December 6, 1995, the trial court awarded Marshall the following: attorney fees against the Corporation, Boulden, C. Braumiller, and A. Braumiller, without apportionment; prejudgment interest at the rate of six percent (6%); and post-judgment interest at the rate of eight point three one percent (8.31%). The application of the Corporation for attorney fees and costs was denied. (Appendix at a20-a22).

The Appeal. Upon appeal, the Oklahoma Court of Civil Appeals of the State of Oklahoma, Division I, affirmed the jury verdict, award of attorney fees, and post-judgment interest. The Oklahoma Court of Civil Appeals reversed the prejudgment interest award. (Appendix at Ex. C). Rehearing was denied. (Appendix at Ex. B). Petition for a Writ of Certiorari to the Supreme Court of Oklahoma was denied. (Appendix at Ex. A).

STAGE AT WHICH FEDERAL QUESTION RAISED

Petitioner A. Braumiller attempted to raise the federal questions of denial of due process and equal protection in his two motions for summary judgment. The constitutional questions did not fully emerge until completion of the trial and arose, not from one issue, but from the accumulation of arbitrary and irrational rulings and irregularities throughout the proceedings. The Corporation, A. Braumiller, C. Braumiller, and Boulden timely filed an appeal setting forth claims alleging a denial of constitutionally protected rights.

In particular, A. Braumiller proposed that he was denied the equal protection of the Oklahoma Guaranty Statute, Okla. Stat. Ann. tit. 15, §§ 321-344 (West 1993), and the common law – that under those provisions he was entitled to summary judgment. C. Braumiller and Boulden proposed that they were denied the equal protection of the Oklahoma General Corporation Statute, Okla. Stat. Ann. tit. 18, §§ 1001-1144

(West 1986), and the common law. All of the defendants alleged that the rulings, irregularities in the proceedings, abuse of discretion, improper jury instructions, surprise, errors of law, insufficiency of the evidence, and the submission of questions of law to the jury acted together to deny them a fair trial and thus deprived them of both procedural and substantive due process.

In light of Marshall's amended petition and the ruling of the trial court with regard to the pretrial, A. Braumiller further argued that he was denied notice that he would be subjected to allegations that he was a guarantor during trial. He pointed out that procedurally "the contents of the pretrial order shall supersede the pleadings and govern the trial of the case," Rule 5(I) of the Rules for the District Courts of Oklahoma; and that Oklahoma law holds that an amended petition which does not incorporate prior pleadings by reference or inclusion is an abandonment of all those prior averments. *Scott v. Price*, 123 Okla. 172, 247 P. 103 (1926); *Edwards v. Andrews, Davis, Legg, Bixler*, 650 P.2d 857, 859 (Okla. 1982). (Appeal Brief in Chief at 25-26).

A. Braumiller also argued that the general verdict, which did not state whether his liability was as a guarantor or as a contracting party, extinguished his right under Oklahoma guaranty law to proceed against the other defendants for full recovery. (Appeal Brief in Chief at 23).

The Oklahoma Court of Appeals failed to rule on the constitutional questions, upholding the jury verdict upon state law. The appellant court did however address the alleged due process violation as to the amended pretrial order finding that the ruling of the trial court should have neither surprised nor prejudiced the defendants. (Appendix C at paragraph 16). The opinion of the Court of Appeals also states that the defendants "failed to provide authority for their contention that they were denied due process by the proceedings." (Appendix C at paragraph 16).

Even though all parties stipulated that the Corporation was a valid corporation in good standing, the appeals' court

found that because the certificate of incorporation for the Corporation was not filed with the Secretary of State until August 6, 1993, "the contract was entered into before the Corporation came into existence." (Appendix C at para. 30).

REASONS FOR GRANTING THE WRIT

Courts have a constitutional obligation to identify and correct constitutional violations. Because the Oklahoma courts were derelict in this duty as to all petitioners, this Court should grant the writ.

Certiorari should also be granted to establish explicit guidelines for the protection of individuals from arbitrary government action. Further, the Court should take this case to clearly establish that valuable state-created property interests, once created, should be protected against wrongful termination whether the deprivation arises under a taking, denial of substantive due process, equal protection, or procedural due process.

ARGUMENT

Oklahoma Abdicated Its Responsibility to Treat Petitioners Fairly and Equally Under The Law

There can be no question in this case that the jury and/or court sought to see that the local contractor received payment from his out-of-town customers. The petitioners fully agree that if the contractor performed the work satisfactorily, he was entitled to be paid the agreed or quantum meriut amount by the contracting party. However, in our system of jurisprudence a plaintiff is required to sue the proper party or parties in the proper court and prove each element of his cause of action, having given adequate notice. All litigants are entitled to fair procedures and an unbiased, competent decision-maker. In the case at bar, these safeguards were not afforded to Petitioners A. Braumiller, Boulden, C. Braumiller, and the Corporation throughout the case, nor were they corrected upon appeal.

The courts of Oklahoma are bound by the procedures required under the Fourteenth Amendment's Due Process Clause. *United States v. Raines*, 362 U.S. 17 (1960). Those protected procedures extend to ownership over money. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). At the very core of due process is the right to notice and an opportunity to be heard. This Court has repeatedly said:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

The trial court placed A. Braumiller in the position of having no notice that he would be subjected at trial to allegations that he was a guarantor. The court ruled that the case would be tried upon the theory that A. Braumiller was a contracting party, but then proceeded, over his objection, to allow testimony regarding an alleged guaranty.

It is well settled in Oklahoma law that the pretrial order shall govern the trial of the case so that all parties know precisely what is in controversy. *Dailey v. Barnhart*, 768 P.2d 907, 909 (Okla. App. 1988) (citing *Erff v. MarkHon Industries, Inc.*, 718 F.2d 613 (7th Cir. 1986)); Rule 5(I), Rules for the District Courts of Oklahoma. It is precisely these procedures that provide us with rule by law rather than by whim. As Justice Douglas wrote: "Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951).

Petitioners, Boulden and C. Braumiller, were denied equal protection afforded to other similarly situated corporate officers and directors of corporations organized and legally functioning under the laws of the State of Oklahoma. By

ignoring the corporate entity completely, the court unlawfully forged an unconstitutional taking of the private property of the stockholders.

Officers, directors, and shareholders of corporations are shielded by Oklahoma law from personal liability for corporate debt. Okla. Stat. Ann. tit. 18, § 1006(B)(6) (West 1986); *Puckett v. Cornelson*, 897 P.2d 1154, 1155 (Okla.App. 1995). The law recognizes that a corporation can only conduct business through its officers, agents, and employees. *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491, 1499 (10th Cir. (Okla.) 1994).

The court and not the jury must make findings of law. No such findings were made by the court or the jury. The whole framework of corporation law was merely swept aside and ignored in order to obtain a judgment against the stockholders individually. *Gulf Oil Corp. v. State*, 360 P.2d 933, 936 (Okla. 1961). The court's action in ignoring these well established rights with regard to these petitioners denied them equal protection, due process, and resulted in an unconstitutional taking.

The courts of Oklahoma in this case abdicated their responsibility to protect the rights of all litigants and punished C. Braumiller and Boulden for doing what the law plainly allows them to do – form and conduct business through a corporation.

This Court Should Grant Certiorari to Provide Guidance and Resolve Conflict Among Lower Courts Regarding Whether and to What Degree Substantive Due Process Protects Property Interests from Arbitrary State Governmental Infringement.

This Court has developed bright line guidance for due process procedural protections for protected property interests. *Cleveland Bd. Of Education v. Loudermill*, 470 U.S. 532 (1985). While petitioners believe the procedures in this case were flawed with regard to those guidelines, the

Court has not yet set out similar guidelines with regard to substantive due process protections.

In *Harrah Independent School District v. Martin*, 440 U.S. 195 (1978), this Court reversed the Tenth Circuit's ruling that a school board's decision not to renew a teacher's contract constituted an arbitrary action offending notions of fairness embodied in the Due Process Clause. This Court reasoned that the teacher's interest in continued employment did not resemble a basic interest such as procreation, marriage, and family life and therefore required the school board to meet only a minimal obligation of acting rationally. The Court did not address the threshold question as to whether or not the teacher had a protected property interest implicating her substantive due process rights, but found that the School Board's action was not so arbitrary as to constitute a substantive due process violation.

In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), this Court assumed for its decision that a medical student had a valid protected property interest in continued enrollment entitling him to raise a substantive due process challenge to his dismissal after he failed an exam that students had to pass in order to remain in the program. The Court held there was no violation of the student's substantive due process rights, but did not supply any guidelines or provide any instruction as to when property interests merit substantive due process protection.

The Court recently overturned an Alabama jury's four million dollar punitive damage award finding it "grossly excessive" under due process. *BMW of North America, Inc. v Gore*, 116 S. Ct. 1589 (1996). Although the five to four decision turned on procedural due process, the court implicitly recognized that property rights are entitled to constitutional substantive due process protection. However, the court again did not set out guidelines for the protection of property rights under substantive due process.

Applying these decisions of this Court, lower federal courts have reached conflicting conclusions regarding

whether property interest created by state law as in the instant case should receive federal substantive due process protection. For example, the Third Circuit in *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1995), *cert. denied*, 116 S. Ct. 352, granted a substantive due process claim stating that ownership in an automobile repair shop is a property interest worthy of substantive due process protection from an adverse zoning decision if that decision was arbitrary or irrationally reached. In contrast, it appears that the Seventh Circuit refuses to recognize substantive due process claims unless they involve another constitutional right or inadequate state law remedies. *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989); *Kauth v. Hartford Ins. Co. of Ill.*, 852 F.2d 951 (7th Cir. 1988); *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177 (7th Cir. 1996). On the other hand, the Second Circuit recognizes substantive due process protection for property rights, but provides such protection to only those interests implicit in the concept of ordered liberty or that implicate fundamental rights. *Local 342, Pub. Serv. Employees v. Town Bd.*, 31 F.3d 1191, 1196 (2nd Cir. 1994).

This case thus presents this Court with the opportunity to resolve a conflict among the courts and to provide firm, coherent guidelines to lower courts so as to protect citizens from arbitrary and irrational state governmental actions regardless of the procedures that were followed.

CONCLUSION

Petitioners A. Braumiller, C. Braumiller, Boulden, and the Corporation respectfully submit that because they were deprived of their rights as guaranteed by the U.S. Constitution, this Court should grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

H. L. HOLTMANN
Counsel of Record
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Bridgeport II
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Attorney for the Petitioners
Peace & Love, Inc., Rob Boulden,
Colin Braumiller, and Allen S.
Braumiller

Exhibit A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA
Thursday, November 13, 1997

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

86,647 Keith Marshall d/b/a R. K. Marshall Construction v. Peace & Love, Inc., an Oklahoma corporation et al.

Certiorari denied.
All Justices concur.

/s/_____
Chief Justice

Exhibit B

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ODER OF COURT OF CIVIL APPEALS

DIVISION I
September 3, 1997

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

86,647 Keith Marshall, d/b/a R.K. Marshall Construction, Plaintiff/Appellee v. Peace & Love, Inc., an Oklahoma corporation; Rob Boulden; Colin Braumiller; and Allen S. Braumiller, individuals, Defendants/Appellants.

Appellants' Petition for Rehearing is DENIED.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 3rd day of September 1997.

/s/
CAROL M. HANSEN, Presiding Judge

Exhibit C

NOT FOR PUBLICATION
IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

KEITH MARSHALL, d/b/a R. K. MARSHALL CONSTRUCTION,
Plaintiff/Appellee,

vs.

PEACE & LOVE, INC., an Oklahoma Corporation; ROB BOULDEN; COLIN BRAUMILLER; and ALLEN S. BRAUMILLER, individuals,
Defendants/Appellants.

No. 86,647

APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY, OKLAHOMA

HONORABLE DONALD J. WORTHINGTON, JUDGE

AFFIRMED IN PART/REVERSED IN PART

Melissa DeLacerda,
Stillwater, Oklahoma, Attorney for Plaintiff/Appellee,

H. L. Holtmann, Attorney for Tulsa, Oklahoma,
Defendants/Appellants.

OPINION

Opinion by Kenneth L. Buettner, Judge:

1. Defendants/Appellants Peace & Love, Inc. (the Corporation), Rob Boulden (Boulden), Colin Braumiller (C. Braumiller) and Allen S. Braumiller (A. Braumiller), (collectively, Defendants), appeal from a jury verdict rendered against them in a contract action filed by Keith Marshall, d/b/a R.K. Marshall Construction (Marshall). Marshall sued to recover money allegedly owed on an oral construction contract. The Corporation, Boulden and C. Braumiller filed a counterclaim in which they alleged Marshall caused their business to fail. Jury trial was held August 21-23, 1995. Marshall was awarded $45,338.38. The jury also found in favor of Marshall on the counterclaim.

2. A. Braumiller contacted Marshall in July 1993 to inquire whether Boulden and C. Braumiller, A. Braumiller's son, might hire Marshall to remodel a building Boulden and C. Braumiller had leased in Stillwater. Boulden and C. Braumiller intended to open two dance clubs in the building. A. Braumiller apparently faxed to Marshall a list of suggested repairs prepared by another contractor. A. Braumiller asked Marshall to pick five things from the list that, if completed, would allow C. Braumiller and Boulden to open the clubs. Marshall gave an oral bid of $5,560 to perform the first five tasks. This bid was accepted and work began July 28, 1993.

3. Boulden and C. Braumiller hoped to have the clubs open before the start of the fall 1993 school semester. Construction was halted on August 10, however, because the beer license applications for the clubs were denied. In the meantime, the certificate of incorporation was filed with the Secretary of State for Peace & Love, Inc. on August 6, 1993. Despite the fact that beer licenses were never obtained, work renewed at the direction of C. Braumiller on August 23, 1993 and was completed October 15, 1993. One of the clubs

opened in September 1993. Neither club was open for a full year.

4. Before the work was temporarily stopped in August, C. Braumiller or Boulden had orally ordered further work beyond the five projects originally agreed to. Marshall submitted an invoice to the Corporation on August 20, 1993 for $7,779.80 for the initial five items and the additional work requested. Before the project was finished, C. Braumiller and Boulden had orally requested that more projects be completed and that several of the remodeling projects be redone differently. A meeting was held between C. Braumiller, Boulden, A. Braumiller and Marshall on September 13, 1993. A. Braumiller testified that at the meeting Marshall informed him it would cost $15,000 to complete the work needed on the clubs. On October 19, 1993, Marshall submitted an invoice to the Corporation for $53,549.17.

5. At the time this bill was submitted, payments had been made by C. Braumiller, Boulden and A. Braumiller, from different accounts, totaling $24,779. At A. Braumiller's request, Marshall submitted a breakdown of subcontractor costs as well as labor and materials costs. A statement was submitted to the Corporation in December 1993 which stated the total project cost at $70,117.38. After subtracting the $24,779 already paid, and adding interest, the stated balance due was $46,224.46.

6. Marshall filed his petition seeking a judgment in the amount of the balance. Marshall further alleged that A. Braumiller had guaranteed payment on the contract. The Corporation, C. Braumiller, and Boulden alleged in their counterclaim that the work was not completed before the beginning of the fall semester, which caused them to lose money and ultimately caused the business to fail. A. Braumiller filed his answer alleging as an affirmative defense that the alleged guaranty was invalid and unenforceable.

7. The first allegation of error is that the court erred in not granting summary judgment to A. Braumiller on the guaranty claim. A. Braumiller argues that a guaranty to

answer for the debt, default or miscarriage of another must be in writing. 15 0. S. 1991 §§ 136, 324. A. Braumiller argues there is no substantial controversy that he did not agree in writing to guarantee payment for the construction.

8. In his November 16, 1993 letter requesting documentation for all charges, A. Braumiller wrote:

> As I told you in the beginning, I will see that all documented and approved work and materials are paid for. . . . Be assured that I will see that everything I am able to understand and which I remotely could be considered *(sic)* as having approved will be paid in a reasonable period of time.... My position is that of a well-wishing father, and lender/co-signer for a partner of the Company, only. I have no ownership or interest, but I will "guarantee" reasonable payment of reasonable charges if the Company falls to pay you as I have suggested above.

In a letter to Marshall written January 26, 1994, A. Braumiller stated:

> (w)hen I assured you that I would see that you were paid, I based such verbal assurance on your verbal estimate of a total of $18,000 for the remodeling job... I continue in my intention to see that you are fairly compensated by P & L, but it was never my intention to guarantee repetitious payment for unsatisfactory work, nor was my verbal agreement to back P & L's credit in this matter ever to have been considered to have been unlimited, or to have gone beyond the $36,000 verbal estimate.... If eventually there are unpaid amounts, which I can understand and which you feel I have guaranteed, then please contact me at that time.

It is true that no document titled "guaranty agreement" was executed. A. Braumiller therefore argues no enforceable guaranty exists. A. Braumiller further alleges that the fact

that Marshall amended his petition on the day trial began and did not allege the guaranty proves that no guaranty existed.

9. First we note that a written document need not be in any particular form to be interpreted as a guaranty. *Ross v. Russell*, 475 P.2d 152, 155 (Okla.1970). "In determining from the language used whether a guaranty exists, the language used should be taken most favorably against the guarantor and in favor of the party who acted upon the faith of the interpretation most favorable to his rights." *Id., quoting Federal Savings & Loan Assn. v. Bell*, 146 Okl. 128, 131, 293 P. 214, 217 (1930).

The document found to be a written guaranty in *Ross* was a letter written after the defendant couple moved out of state to avoid paying their debts. The wife wrote a letter to her attorney stating that she intended for the plaintiff to be paid and she intended to work until the couple's debts were paid and finally that she personally intended to pay the plaintiff. *Ross, supra*, at 154. The letters in the instant case were at least as specific in stating that A. Braumiller guaranteed Marshall would be paid. Accordingly, we find a factual dispute remained whether A. Braumiller letters contained language creating a guaranty.

10. In addition to his motion for summary judgment on the guaranty issue, A. Braumiller later filed another motion for summary judgment after Marshall amended his petition to allege that A. Braumiller was a co-maker of the contracts. A. Braumiller next alleges the trial court erred in not granting him summary judgment on this claim. In the statement of undisputed facts in this motion for summary judgment, A. Braumiller states that he accepted the initial bid of $5,560 from Marshall in a phone call. The evidence also indicated it was A. Braumiller who ordered the work stopped when the beer licenses were denied. We therefore find that before trial, issues of fact remained whether A. Braumiller was a party to the actual construction contract.

11. A. Braumiller next alleges the trial court erred in admitting the two letters he wrote to Marshall which include

language of a guaranty. We review allegations of error regarding the admissibility of evidence for an abuse of discretion. The record must reveal error which probably either resulted in a miscarriage of justice or a substantial violation of a constitutional or statutory right. *Joffe v. Vaughn*, 1993 OK CIV APP 169, 873 P.2d 299. A. Braumiller contends that the letters are parol evidence, that they fail to qualify as a guaranty and that they reveal no meeting of the minds occurred. A. Braumiller provides no authority for these arguments except the holding that memoranda must set forth the parties, subject matter, consideration and terms of the contract. *Citing Joseph E. Seagram & Sons, Inc. v. Shaffer*, 3 1 0 F. 2 d 66 8, 674 (10th Cir.1963), *cert. denied*, 373 U.S. 948, 83 S.Ct. 1678, 10 L.Ed.2d 704 (1963).

12. A. Braumiller did not object to the admission of these letters. In addition, if, as A. Braumiller argues, the letters reveal no meeting of the minds occurred, the letters are relevant on the issue of the existence of a contract. The letters also were evidence of a guaranty. We therefore find the letters relevant and properly admitted.

13. All of the Defendants next allege they were prejudiced because voir dire was not conducted on the record and transcribed. Again, no authority for this argument is provided, nor is any allegation of actual prejudice made, beyond the statement that because the trial was held in Marshall's hometown, the other parties were necessarily prejudiced. Defendants are charged with requesting that a record be made if they so desired.

14. Defendants next allege the court erred in amending the pre-trial order at the beginning of the trial. Defendants allege the amendment amounted to unfair surprise and that as a result they were denied due process of law. Marshall submitted a proposed pre-trial order which was filed May 22, 1995. The pre-trial order included in its general statement of facts that Marshall sued the Corporation, Boulden and C. Braumiller to enforce an oral construction contract and sued

A. Braumiller as guarantor of the contract. The court wrote on the pre-trial order that Marshall would amend his petition instanter and that Defendants had 30 days to answer. The amended petition alleged that the Corporation, A. Braumiller, C. Braumiller, and Boulden breached a construction contract entered with Marshall. Marshall argued in his Brief in Opposition to A. Braumiller Motion for Summary Judgment, filed August 21, 1995, the day of trial, that A. Braumiller guaranteed the contracts and that whether A. Braumiller was a party to the contracts was a factual dispute.

15. On the day trial began, counsel for A. Braumiller argued that the amended petition should have resulted in the guaranty claim being dropped, but that the pretrial order had not been amended to reflect that. In other words, counsel requested the pretrial order be amended on the day of trial. Counsel also entered a standing objection to "anything further in this matter having to do with the guarantor status" of A. Braumiller. The court responded that "the pre-trial order is amended to reflect the allegations of the amended pleadings to the effect that plaintiff claims that defendant Allen Braumiller is a party to the contract as well as a guarantor." (Vol. I tr. 5). Counsel for A. Braumiller continued to press the court on whether the amended petition included the guarantor claim. The court's final statement on the issue is that "(t)he court's going to hear the evidence that both parties have to present in connection with this dispute and with this contract." (Vol. I tr. 6). The Jury instructions included instructions 25-28 which defined a guaranty and the proof required. The jury also was informed in instruction No. 3 that Marshall claimed all Defendants entered the construction contract and that A. Braumiller guaranteed payment on the contract.

16. Defendants sought to have the pre-trial order amended the day of trial. The court did so, but not in the way Defendants hoped. Defendants now assert the amendment was error. The pre-trial order, which included the guaranty claim, was filed the same day the amended petition was filed.

Accordingly, an ambiguity exists whether the initial pre-trial order supplants the amended petition. The timing is relevant, however, only to establish that Defendants should not have been surprised by the guaranty issue remaining because pre-trial orders supersede the pleadings. Rule 5(l), Rules of the District Courts. Therefore, when the court amended the pre-trial order, the effect was that the pleadings were also amended to include the guaranty claim. Because the guaranty issue remained in the pre-trial order from the time of the pre-trial conference, and indeed from the time of the initial petition, Defendants have not convinced this Court that they were surprised or prejudiced by the court's decision to amend the pretrial order to add the contract claim to the already present guaranty claim against A. Braumiller. Further, Defendants did not request a continuance when they learned the pre-trial order was amended. The trial court has discretion to make orders regarding the pre-trial order. *Middlebrook v. Imler, Tenny, and Kugler, MD.'s, Inc.*, 1985 OK 66, 713 P.2d 572. We are not persuaded the court abused its discretion under the facts involved herein because no prejudice or surprise has been shown. Defendants also have failed to provide authority for their contention that they were denied due process by the proceedings.

17. Defendants next contend that the jury instructions were incomplete and failed to reflect Oklahoma law. Specifically, Defendants challenge instruction Nos. 10 and 8. They assert that instruction No. 10 was correct on its face, but that it misled the jury to believe that an oral guaranty could be valid. Defendants allege instruction No. 8 was error because it allowed the jury to pierce the corporate veil, which they allege was not warranted by the evidence. This allegation will be discussed below.

18. In reviewing assertions of error regarding the jury instructions, we must determine if the 'instructions as a whole reflect Oklahoma law. It must appear to a reasonable certainty the jury was misled. *Dutsch v. SeaRay Boats*, 1992 OK 155, 845 P.2d 187, 189. Instruction No. 10 stated:

> A contract may be written or oral. A contract may be express or implied. An express contract is set out in words, either spoken or written. An implied contract is created by the acts or conduct of the parties. No particular form is required for words or conduct to create either an express or implied contract.

A. Braumiller argues this instruction allowed the jury to find that a guaranty may be written or oral. Instruction No. 10 is Oklahoma Uniform Jury Instruction-Civil 23.3. A. Braumiller failed to object to this instruction. To preserve error regarding an instruction, a party must make an exception to the instruction by number in the record. 12 O.S.1991 §578. Because instruction No. 10 was correct on its face and was not the subject of an objection, we do not find error in giving that instruction.

19. The next allegation of error is that the jury verdict is ambiguous and incomplete. The jury returned with a signed verdict form which stated the jury found the issues in favor of Marshall and against Boulden, C. Braumiller and A. Braumiller in the amount of $45,338.38. Defendants raised the issue that no verdict was rendered in the counterclaim and the jury was sent back to determine its verdict on the counterclaim. The jury then returned with a signed verdict form which stated the jury found the issues in favor of Marshall on the counterclaim of Boulden and C. Braumiller. The jury also returned at that time with a signed verdict form which stated the jury found the issues in favor of Marshall on the counterclaim of the Corporation.

20. The Corporation then inquired whether a verdict had been entered in Marshall's claim against the Corporation. The court responded that no verdict had been entered on that claim. The Corporation then asked if the lack of a verdict could be interpreted as a verdict in favor of the Corporation. The court responded that it could not. Finally, the Corporation entered its objection to the form of the verdicts

because they did not resolve the claim against the Corporation.

21. Before deliberating, the jury was given 10 possible verdict forms. The forms not signed included those in which: (1) the jury could find the issues in favor of A. Braumiller, (2) the jury could find the issues in favor of Marshall and against the Corporation, (3) the jury could find the issues in favor of the Corporation, (4) the jury could find the issues in favor of Marshall and against A. Braumiller, (5) the jury could find the issues in favor of Boulden and C. Braumiller on Marshall's claim against them, (6) the jury could find the issues in favor of the Corporation on its counterclaim and against Marshall, and (7) the jury could find the issues in favor of Boulden and C. Braumiller on their counterclaim against Marshall.

22. The Corporation argues the verdicts are ambiguous and incomplete because they do not render a verdict against the Corporation. The Corporation also argues the verdicts against the individual defendants are contrary to law because they are not supported by the evidence which did not support piercing the corporate veil. Finally, A. Braumiller argues the verdicts fall to rule whether he is liable as a guarantor or as a maker of the contract. On this last contention, we note A. Braumiller did not object to the form of the verdict on the guarantor issue, nor did he submit more specific proposed verdict forms. Therefore, any error with regard to a specific verdict whether A. Braumiller was a guarantor is waived. *Cooper v. Woodruff*, 357 P.2d 969, 972 (Okla. 1960).

23. In *Esker v. Kip's Big Boy, Inc.*, 1981 OK 97, 632 P.2d 414, the jury was provided with several verdict forms. It returned the verdict form 'in favor of plaintiff husband, but did not return a verdict form regarding the claims of plaintiff wife. The court found that when construing the signed and unsigned verdict forms together, it was apparent the jury intended to find in favor of the husband, but not in favor of the wife.

24. In addition, in *Cooper, supra*, the court found that although the verdict returned was not necessarily perfect, it

substantially ruled on the questions in issue so as to enable the court to intelligently pronounce judgment according to the manifest intent of the jury. In the instant case, as will be discussed *infra*, the jury was instructed on the factors to be used in determining whether to disregard the corporate entity. The jury returned verdicts ruling in favor of Marshall and against all three individual defendants. The judgment reflected that no verdict was entered against the Corporation. Further, the jury ruled in favor of Marshall on the counterclaim of the Corporation. We therefore find the trial court correctly entered judgment against the three individual defendants according to the manifest intent of the jury.

25. Boulden, C. Braumiller and A. Braumiller next allege the court erred in awarding prejudgment interest on the damages award. In its order addressing various post-trial motions, the court awarded pre-judgment interest on the amount of the judgment at 6% per annum simple interest. Title 23 O.S.1991 §6 provides that any person entitled to recover damages certain, or capable of being made certain by calculation, may recover interest on such amount from the date such amount becomes vested in him.

26. Defendants allege that trial was required to determine the amount of damages and that, accordingly, the damages were not certain and Section 6 does not apply. In the instant case, Marshall submitted a final invoice of $70,117.38 and Defendants had made payments in the amount of $24,779. Marshall had documentation to support the amount of the invoice. Accordingly, in his motion to award prejudgment interest he argued that the amount of damages was certain. However, Defendants alleged at trial that the work was done poorly in several instances and that they should not have been charged for work which had to be performed twice. In addition, they argued that they did not agree to work totaling $70,117.38. Testimony was conflicting on different estimates provided at different stages in the project. Accordingly, the amount of damages, if any, was not capable of being ascertained until after the jury rendered its

verdict. *See Sandpiper North Apartments, Ltd. v. American National Bank and Trust Co. of Shawnee*, 1984 OK 13, 680 P.2d 983. We therefore reverse the award of prejudgment interest.

27. Defendants next complain that the court erred in awarding Marshall a single sum attorneys fee and costs. They allege the trial court should have apportioned the award to represent the fees owed by Boulden, C. Braumiller, and A. Braumiller. They further allege it was error to include the Corporation in the award of attorney fees because no verdict was rendered against them and also that the Corporation should have been awarded attorney fees as the prevailing party in Marshall's claim. We first note that a verdict was rendered against the Corporation on its counterclaim.

28. The prevailing party in an action on a stated account or contract relating to the purchase or sale of goods, or for labor or services shall be allowed a reasonable attorney fee. 12 O.S.1991 §936. Defendants allege the trial court should not have awarded Marshall's counsel $200 an hour without expert testimony on the reasonableness of that amount in the local community. The court awarded counsel for Marshall $12,258.99 and noted Defendants' objection to that amount. Marshall's counsel filed time records requesting $125 per hour for 58.75 non-trial hours and $200 per hour for 22.5 trial hours. The order awarding attorney fees notes that the parties were in agreement on the reasonableness of Marshall's counsel's hours and expenses and asked the court to determine the appropriate hourly rate. In the order the court expressly found the rates sought were reasonable. No record was made of the hearing on this motion. The court's determination of reasonable attorney fees is discretionary. *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659, 663 (Okla.1979). "To reverse on the grounds of an abuse of discretion, it must be found that the trial judge made a clearly erroneous conclusion and judgment, against reason and evidence.'" *Oklahoma Turnpike Authority v. Little*, 1993 OK II 6, 860 P.2d 226, 228 *quoting Abel v. Tisdale*, 1980 OK 161,

619 P.2d 608, 612. Defendants have not provided any evidence that the court's acceptance of rates requested by counsel for Marshall constituted an abuse of discretion nor have they provided a record showing that they objected to the lack of expert testimony. Absent an objection to the alleged lack of expert testimony, Defendants have waived this issue.

29. Finally, throughout their brief on appeal, Defendants allege the court erred in allowing the jury to disregard the corporate entity. A. Braumiller first contacted Marshall in July 1993 and Marshall began work pursuant to the contract on July 28, 1993. The certificate of incorporation for Peace & Love, Inc. was not filed with the Secretary of State until August 6, 1993. In addition, none of the payments made to Marshall during the course of the construction was drawn on a corporate check. Boulden testified he did not know if the Corporation ever opened a bank account. In addition, the beer license application was not in the name of the Corporation, nor was the Corporation named in the business loan obtained from BancFirst.

30. A corporation is formed by filing a certificate of incorporaton with the Secretary of State. 18 O.S.1991 §1005. Therefore, the contract was entered into before the Corporation came into existence. Defendants do not allege that subsequent contracts were entered or that a novation of the original contract was made substituting the Corporation for the individual contracting parties.

31. The court instructed the jury on the factors to be considered in determining whether a corporation is a mere instrumenality of an individual found in *Home-Stake Production Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012(10th Cir. 1990)[1] The court in *Home-Stake* noted that the factors it

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[1] Instrution No. 8 stated: A corporation is a distinct legal entity separate and apart from other legal entities. It is permitted under the law to carry on business as an entity distinct from the individuals who are interested in and control it. If you find that the agreements for the repair and remodeling were the agreements of plaintiff and Peace and Love, Inc., a corporation(,) the individual defendants are protected from liability for

prescribed amounted to a different test than that required to "pierce the corporate veil." That showing requires additional proof that the corporation was used to perpetrate fraud. The instruction given in the instant case provided additional factors beyond the five prescribed in *Home-Stake*.[2] In addition, the instruction in the instant case required the jury to find that the Corporation was used to perpetuate a fraud, an element required to disregard the corporate entity. We therefore find the jury was correctly instructed on this issue. Accordingly, we must give deference to the jury's determination and affirm their decision if supported by any competent evidence. *Bradley v. Clark*, 1990 OK 73, 804 P.2d 425, 427.

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the acts of the corporation under those agreements unless you find that plaintiff has shown from all the facts that the separate corporate existence of Peace and Love, Inc. is a design or scheme to perpetuate fraud.

The factors you may consider in making this decision are:

1. Did Peace and Love, Inc. have adequate capitalization to conduct its business,

2. Did Peace and Love, Inc. observe corporate formalities--did it hold directors' and shareholders' meetings and adopt resolutions authoring officers to act on behalf of the corporation,

3. Did Peace and Love, Inc. conduct business in its corporate name,

4. Did Peace and Love, Inc. maintain a separate and distinct bank- account,

5. Were these funds used solely by the corporations

6. Did Peace and Love, Inc. apply for and receive credit in its corporate name; were all such funds paid in the name of or on behalf of the corporation, Peace and Love, Inc.

7. Did Peace and Love, Inc. distinguish in advertising and in contacts with the public that it ",as a corporate entity?

[2] The factors listed in *Homestake* include 1) corporation is undercapitalized, 2) corporate finances are not kept separate, 3) corporation is without separate books, 4) corporate formalities are not followed, and 5) corporation is merely a sham.

32. Because there was competent evidence that most of the factors existed, and because the corporation came into existence after the contract was made, we find support for the jury's verdict that the individual Defendants were liable rather than the Corporation. The goal in piercing the corporate veil is to impute liability for the acts of the corporation to the responsible person. *Matter of Estate of Rahill*, 1991 OK CIV APP 83, 827 P.2d 896, 897. It is not evident in this case that the contract was the act of the Corporation, and the evidence supports the finding that the individual Defendants are responsible for entering the contract and for its breach.

33. We affirm the jury's verdict and award of damages. We also affirm the award of attorney's fees to Marshall. However, we find the amount of damages was uncertain before trial and therefore we reverse the award of pre-judgment interest.

AFFIRMED IN PART/REVERSED IN PART.

HANSEN, P.J., and JOPLIN, J., concur.

Exhibit D

IN THE DISTRICT COURT OF PAYNE COUNTY
STATE OF OKLAHOMA

KEITH MARSHALL, d/b/a R.K. MARSHALL CONSTRUCTION

Plaintiff.

vs.

PEACE & LOVE, INC., an Oklahoma Corporation, ROB BOULDEN, COLIN BRAUMILLER, and ALLEN S. BRAUMILLER, individuals.

Defendants.

No. CJ-94-225

JOURNAL ENTRY OF JUDGMENT

NOW, on the 21st day of August, 1995, this matter comes on for trial in its regular order before a jury of twelve persons being duly empanelled and sworn to try the issues in the above referenced matter. Plaintiff appears in person and by and through his attorney, Melissa DeLacerda. Rob Boulden appears as an officer of Peace & Love, Inc., which is represented by its attorney, H. L. Holtmann. Defendants, Rob Boulden and Allen S. Braumiller, appear in person and are represented by their attorney, H. L. Holtmann. Defendant, Colin Braumiller, appears not, but is represented by his attorney, H. L. Holtmann.

After hearing the testimony and evidence presented and statements of counsel for Plaintiff and Defendants, the jury, on this 23rd day of August, 1995, renders a verdict in favor of the Plaintiff, Keith Marshall, d/b/a R. K. Marshall Construction and against the Defendants, Rob Boulden, Colin Braumiller and Allen S. Braumiller in the amount of

$45,338.38. Further, the jury renders a verdict in favor of Plaintiff, Keith Marshall, d/b/a R. K. Marshall Construction, on the Counterclaim of Defendants Rob Boulden and Colin Braumiller. Further, the jury renders a verdict in favor of Plaintiff, Keith Marshall, d/b/a R. K. Marshall Construction, on the Counterclaim of Defendant, Peace & Love, Inc. No verdict is rendered on Plaintiff's claims against Peace & Love, Inc.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff, Keith Marshall, d/b/a R. K. Marshall Construction is hereby awarded judgment against the Defendants, Rob Boulden, Colin Braumiller and Allen S. Braumiller, in the amount of $45,338.38.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Counterclaim filed by Defendants against the Plaintiff is hereby found in favor of the Plaintiff, Keith Marshall, d/b/a R. K. Marshall Construction, and Defendant's Counterclaim is therefore denied.

_____

Donald L. Worthington, District Judge

APPROVED:

_____

Melissa DeLacerda (OBA #2278)
P.0. Box 1252
Stillwater, OK 74076
Attorney for Plaintiff

_____

H. L. Holtmann (OBA #4333)
200 Center Plaza
Tulsa, OK 74119
(918) 585-8200
Attorney for Defendants

IN THE DISTRICT COURT OF PAYNE COUNTY
STATE OF OKLAHOMA

KEITH MARSHALL, d/b/a
R.K. MARSHALL CONSTRUCTION

Plaintiff,

vs.

PEACE & LOVE, INC., an Oklahoma Corporation, ROB BOULDEN, COLIN BRAUMILLER, and ALLEN S. BRAUMILLER, individuals.

Defendants.

CJ-94-225

ORDER

THIS MATTER COMES ON BEFORE THE COURT this 13th day of November, 1995 pursuant to various Motions and Applications of the parties. The Plaintiff is represented by his attorney, Melissa DeLacerda and Defendants are represented by their attorney, H. L. Holtmann. After hearing the statements and arguments of counsel, reviewing the file, including the briefs of the parties, the Court finds that the parties agree as follows:

1. The parties have agreed that the Court should enter an order staying execution of the judgment for thirty (30) days from November 13, 1995 to allow the Defendants time to file an Appeal Bond.

2. The Defendants have withdrawn their Motion to Waive Appeal Bond.

3. With respect to the Attorney Fee Request of the Plaintiff, the parties have agreed that the hours submitted by

counsel for Plaintiff and the expenses of counsel for Plaintiff are reasonable.

4. The parties have asked the Court to determine the appropriate hourly rate and the amount of attorney's fees which should be awarded.

5. The parties have agreed upon a journal entry of judgment with regard to the verdict of the jury and have presented same for signature by the Court.

6. The parties have submitted the issue of pre-judgment interest to the Court.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES, the Court further finds as follows:

7. With regard to the Appeal Bond which shall be set in this matter, the Court finds that the Defendants should have one of the following alternatives:

a. The Defendants may post a cash bond equal to double the amount of the judgment or;

b. A surety bond may be filed which is equal to the Journal Entry of Judgment, the Pre-Judgment Interest, the attorney's fees, and costs of the Plaintiff.

8. The Court finds that the pre-judgment interest in this matter should be at six percent (6%) per anum simple interest on the judgment amount only.

9. The Court finds that the post-judgment interest in this case shall be 8.31 % from the date of the verdict.

10. With regard to the attorney fee issue, the Court finds as follows: the amount of attorney's fees requested by Plaintiff is reasonable, notwithstanding the Defendants' argument as made in their brief, and awards the amount of $12,258.99. The Defendants' objection to this award is noted.

11. With regard to the Journal Entry of Judgment presented by the parties, the Court has signed that Journal Entry and directed that it should be filed of record.

12. With regard to the stay of execution requested by the Defendants and agreed to by the Plaintiff, the Court has signed –an –order to that affect and directed that it be filed of record.

13. With regard to the amount of pre-judgment interest, the Court finds that interest should be awarded to the Plaintiff on the amount of the judgment at the rate of six percent (6%) per anum from the date of filing of the Petition to the date of this Order and based upon 23 O.S. §6. The Court notes the Defendants' objection.

IT IS SO ORDERED IN ACCORDANCE WITH THE ABOVE FINDINGS.

_____
Judge of the District Court

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Attorney for Defendants

Exhibit E

IN THE DISTRICT COURT OF PAYNE COUNTY
STATE OF OKLAHOMA

KEITH MARSHALL, d/b/a
R.K. MARSHALL CONSTRUCTION,
Plaintiff,

vs.

PEACE & LOVE, INC., an Oklahoma corporation;
ROB BOULDEN; COLIN BRAUMILLER; and
ALLEN S. BRAUMILLER, individuals.
Defendants.

Case-No.CJ-94-225

AMENDED PETITION

Count I

Keith Marshall, d/b/a R.K. Marshall Construction, Plaintiff herein, by and through his attorney, Melissa DeLacerda for his first cause of action against Defendants, Peace & Love, Inc., Rob Boulden, Colin Braumiller, and Allen S. Braumiller, alleges and states:

1. That said Plaintiff entered into a contract with Defendants, Allen S. Braumiller, Rob Boulden and Colin Braumiller, by which said Plaintiff was to furnish certain material and perform certain labor for the improvement of a building located at 601 South Washington Street, Stillwater, Payne County, Oklahoma, of which said building Defendants, Allen S. Braumiller, Rob Boulden and Colin Braumiller, was the leaseholder.

2. That in performance of said agreement Plaintiff has exceeded $70,117.38 for materials and labor costs and

Plaintiff has received payments from Defendants totaling $24,779.00.

WHEREFORE, Plaintiff demands judgment against Defendants, Allen S. Braumiller, Rob Boulden and Colin Braumiller, for the sum of $45,338.38, interest, and costs, including reasonable attorney fees.

Melissa Delacerda (OBA #2278)
301 South Duck, P. O. Box 1252
Stillwater, OK 74076
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Attorney for Plaintiff

Supreme Court, U.S.
FILED
MAR 12 1998
CLERK

No. 97-1312

In The

Supreme Court of the United States

October Term, 1997

PEACE & LOVE, INC., an Oklahoma Corporation; ROB BOULDEN; COLIN BRAUMILLER and ALLEN S. BRAUMLLER, individuals,

Petitioners,

vs.

KEITH MARSHALL d/b/a R. K. MARSHALL CONSTRUCTION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

RISPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Orders Of The United States Court Of Appeals For The District Of Columbia Circuit Filed February 26, 1998 ..... 1a

Respondent, Keith Marshall d/b/a R. K. Marshall Construction, opposes as follows the petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners enumerate six constitutional and statutory provisions allegedly involved in this case. However, provision No. 2, Article 2, § 7 of the Constitution of the State of Oklahoma, was not cited in the trial or appeal of this case, nor in the Petition in this Court other than in the enumeration of provisions. The same is true for provision No. 3, Article 2, § 6 of the Constitution of the State of Oklahoma, and provision No. 5, Okla. Stat. tit. 15, § 323.

STATEMENT OF THE CASE

This is indeed a debt-collection case, arising out of an oral construction contract. Contrary to Petitioners' portrayal, however, is it nothing more than that. The essence of the case is decidedly not any "tension between the local population and outsiders" [Petition 4]. The case is governed entirely by its own specific facts. The federal questions that Petitioners now allege did not arise in the trial of the matter and were but the tiniest fraction of the argument on appeal. As shown by the recitation of facts to follow, there is no cause for this Court's review of the case.

The Oral Contract. On July 22, 1993, Al Braumiller asked Marshall to submit a bid for construction work. Marshall submitted a bid to Al Braumiller on July 23, 1993, and Al Braumiller directed Marshall to commence work, which began on July 28, 1993. On August 6, 1993, a certificate of incorporation was filed with the Oklahoma Secretary of State

for Peace & Love, Inc. (a material fact which Petitioners do not mention in their Statement of the Case). On August 10, 1993, Al Braumiller directed Marshall to stop work because the beer license applications for the proposed clubs were denied. Then Al Braumiller asked Marshall to resume the remodeling, which Marshall's crew did on August 23, 1993, and continued until October 15, 1993.

Partial Payments. During the course of the work, Marshall received four partial payments, the first of which was a check drawn on an account of Rob Boulden and Colin Braumiller and signed by Rob Boulden; the second was a check drawn on the same account and signed by Colin Braumiller; and the third and fourth were checks drawn on the personal account of Al and Patsy Braumiller. At the conclusion of the project, Marshall submitted an invoice to Peace & Love and then to Al Braumiller, who wrote to Marshall requesting documentation of the costs, also saying:

> As I told you in the beginning, I will see that all documented and approved work and materials are paid for. . . . I will "guarantee" reasonable payment of reasonable charges if the Company fails to pay you as I have suggested above.

[Plaintiff's Ex. 6]. Later Al Braumiller again wrote Marshall:

> I continue in my intention to see that you are fairly compensated by P & L. . . . If eventually there are unpaid amounts, which I can understand and which you feel I have guaranteed, then please contact me at that time.

[Plaintiff's Ex. 16].

Suit to Collect. Marshall sued to collect the unpaid balance, alleging that he had contracted with Rob Boulden and Colin Braumiller as individuals; that he had contracted with Peace & Love, Inc.; and that Al Braumiller had personally guaranteed that Marshall would be compensated [R. 1-4]. Al Braumiller moved for summary judgment alleging that the guaranty was invalid and unenforceable [R. 100-113]. Marshall amended his petition without leave of court to allege that Al Braumiller was a maker on the contract [R. 126-127]. The trial court denied Al Braumiller's motion for summary judgment and struck Marshall's amended petition.

Pre-Trial Order. A pre-trial order was entered providing for trial of Marshall's original counts and permitting Marshall to amend his petition instanter and proceed with a cause of action against Al Braumiller as a principal on the contract [R. 140-146]. Marshall amended his petition alleging that Al Braumiller had breached an oral construction contract [R. 147-148]. Al Braumiller moved for summary judgment on the basis that he was not a contracting party and (for the second time) that he was not a guarantor [R. 186-237]; the motion was overruled. On the first day of trial, Petitioner Al Braumiller sought to have the pre-trial order amended to show the guaranty claim dropped as a result of the amended petition (filed on the same day as the pre-trial order). The trial court did indeed amend the pre-trial order but amended it to include both the contract claim and the guaranty claim.

Appeal of Summary Judgment Denials. Petitioner Al Braumiller appealed the denial of his two summary judgment motions, arguing that both Oklahoma and federal law mandate that summary judgment be granted if there is no substantial controversy as to any material fact [R. 100-113]. The appellate court affirmed the decisions on these two motions because issues of fact had indeed remained as to whether the language of Al

Braumiller's letters created a guaranty and as to whether he, having admitted in his motion that he had accepted Marshall's initial bid, was a party to the construction contract [Opinion at ¶¶ 9, 10; Petition at a7].

Appeal of Trial Rulings and Jury Verdict. Al Braumiller appealed admission of the two letters he wrote to Marshall; the appellate court affirmed because Al Braumiller provided no authority for his arguments, because he had not objected to their admission, because they were evidence of a guaranty, and because they were relevant to the issue of the existence of a contract [Opinion at ¶ 11; Petition at a7-a8].

Petitioners alleged on appeal that they were deprived of a fair and impartial jury trial because voir dire was not conducted on the record; the appellate court affirmed because Petitioners provided no authority for their argument, because they made no allegation of actual prejudice, and because they themselves had been charged with requesting such a record [Opinion at ¶ 13; Petition at a8].

Petitioners alleged on appeal that they were "subjected to trial by ambush" and thereby denied due process by the trial court's amendment of the pre-trial order at the beginning of trial to reflect Marshall's claims that Al Braumiller was a party to the contract and a guarantor. The appellate court affirmed because Al Braumiller himself had sought to have the pre-trial order amended at the beginning of trial, because the guaranty claim had been raised in the initial petition and identified as an issue in the pre-trial order, because Petitioners had not requested a continuance when the pre-trial order was amended, because no surprise or prejudice was shown, and because Petitioners failed to provide authority for their contention that they were denied due process [Opinion at ¶¶ 14-16; Petition at a9-a10].

Petitioners alleged error in jury instruction No. 10; the appellate court affirmed because Al Braumiller had failed to object to that instruction and because it was correct on its face [Opinion at ¶¶ 17-18; Petition at a10-a11].

Petitioners appealed the jury verdict as ambiguous and incomplete; the appellate court affirmed because Al Braumiller had waived any error in not objecting to the verdict form on the guaranty issue and in not submitting more specific proposed verdict forms and because judgment had been entered according to the manifest intent of the jury [Opinion at ¶¶ 19-24; Petition at a11-a13].

Petitioners alleged error on appeal in the "disregard" of the corporate entity; the appellate court affirmed because the contract had been entered into before the corporation came into existence, because none of the payments had been drawn on a corporate account, because Rob Boulden had testified to uncertainty whether the corporation had ever opened a bank account, because the beer license application had not been in the name of the corporation, and because the corporation had not been named in the business loan [Opinion at ¶¶ 29-30; Petition at a15].

Petitioners alleged error in instruction No. 8 on piercing the corporate veil; the appellate court affirmed because there was competent evidence of the existence of most of the factors for determining whether a corporation is a mere instrumentality of an individual [Opinion at ¶¶ 31-32; Petition at a15-a17].

Petitioners alleged error in the award of prejudgment interest on the basis that trial was required to determine the amount of the damages; the appellate court agreed and reversed [Opinion at ¶¶ 25-26; Petition at a13-a14].

Petitioners alleged error in the award of attorney fees without apportionment among the various Petitioners, in the inclusion of the corporation in the award, and in the failure to award attorney fees to the corporation as a prevailing party. The appellate court affirmed because Petitioners provided neither evidence of abuse of discretion nor any record of an objection to lack of expert testimony and because a verdict was indeed rendered against the corporation [Opinion at ¶¶ 27-28; Petition at a14-a15].

STAGE AT WHICH FEDERAL QUESTION RAISED

Petitioners equivocate about the raising of federal questions in this case, asserting that Al Braumiller "attempted" to raise denial of due process and equal protection in his motions for summary judgment [Petition 11]. The fact is that neither motion addresses these, nor any other, federal questions. Both motions list as "undisputed material facts" matters that were indeed disputed, and both motions were denied at trial and affirmed on appeal on that basis.

Petitioners then assert that constitutional questions "fully emerged" after trial [Petition 11]. The fact is that whether Al Braumiller was a guarantor under the statute was an issue of fact (did the language of his letters create a guaranty?), and whether the other individual Petitioners were shielded from liability by the general corporation statute was also an issue of fact (was the contract made before or after the corporation was formed?). At the same time that Al Braumiller contends that he was denied due process in being "denied notice" of trial on the guaranty claim [Petition 12], the record shows that he himself filed two motions for summary judgment in the months before trial, in both of which he addressed the guaranty claim, which had been set forth both in the initial petition and in the pre-trial order. At the same time that Petitioners claim that no evidence

was introduced that the corporation was a mere instrumentality of an individual, the appellate court found competent evidence that *most* of the instrumentality factors existed and also found that the corporation came into existence *after* the construction contract was made.

At the same time that Petitioners contend that the appellate court "failed to rule on the constitutional questions" — an argument that occupied one and one-half pages of their 30-page appellate brief in chief — they also concede that the court cited a lack of factual support (no surprise or prejudice shown) for both alleged constitutional violations and a lack of legal authority for the alleged due process violation [Petition 12].

REASONS FOR DENYING THE WRIT

I.

PETITIONERS PROVIDE NO SUPPORT FOR THEIR ASSERTIONS OF UNFAIR OR UNEQUAL TREATMENT.

Petitioners provide no factual support whatsoever for their assertion that "[t]here can be no question in this case that the jury and/or court sought to see that the local contractor received payment from his out-of-town customers" [Petition 13]. What *is* in fact unquestionable here is that Petitioners had a weak defense at trial and no reversible error (other than the award of prejudgment interest) on which to base their appeal. "Federal questions" were manufactured in an attempt to bolster unwarranted appeal issues. Petitioners have nothing to offer this Court in the way of policy-analysis or law-making opportunities. The Petition is wholly devoid of merit.

In Petitioners' first argument, Al Braumiller complains of no notice of trial on Respondent's guaranty claim [Petition 14].

His subsequent statement — that the trial court ruled that the case would be tried only on the contracting-party claim — misrepresents the facts that he himself presented in his Statement of the Case. There the trial judge is quoted as stating that

> the pre-trial order is amended to reflect the allegations of the amended pleadings to the effect that plaintiff claims that defendant Allen Braumiller is a party to the contract *as well as a guarantor*

[Petition 9 (emphasis added)].

Even if the remainder of the exchange between court and counsel was something less than clear, Al Braumiller can hardly profess surprise that the guaranty claim was tried. As the appellate court noted, he did not ask for a continuance because of his "surprise." Moreover, the *initial petition* included the guaranty claim, the *pre-trial order* included the guaranty claim, and Al Braumiller submitted *two motions for summary judgment* on the guaranty claim.

Al Braumiller cites authority for an argument that the pre-trial order governs the trial of the case [Petition 14]. But again, he disregards the facts: (1) the fact that the pre-trial order *included* the guaranty claim up until the first day of trial; and (2) the fact that, upon his request that the court amend the pre-trial order to *drop* the guaranty claim, the court instead amended the order to *keep* the guaranty claim while adding the contract claim raised in the amended petition (filed on the same day as the pre-trial order). Argument and authority that do not fit the facts are pointless.

As this "no-notice" complaint is the foundation of Petitioners' alleged due process question, this much of their case for a writ of certiorari from this Court is groundless.

Next Petitioners Boulden and Colin Braumiller complain that they were denied equal protection and due process afforded to other *similarly situated* corporate officers and their private property unconstitutionally taken [Petition 14-15]. However, they do not cite any authority that says that individuals are to be shielded from personal liability for contracts made *before* the individuals formed the corporation they would stand behind. Oklahoma law provides that a corporation is formed by filing a certificate of incorporation with the Secretary of State. Okla. Stat. tit. 18, § 1005(A) (1991). In this instance, the oral contract was formed on *July 23, 1993*, when Petitioner Al Braumiller called Respondent to accept his bid, and the corporation was formed on *August 6, 1993*, when Petitioners Boulden and Colin Braumiller filed their certificate of incorporation. Petitioners omit the latter fact from their Statement of the Case and mention the date of the incorporation only in the section entitled Stage at Which Federal Question Raised [Petition 13].

Petitioners cite authority for an argument that corporations conduct business through their officers and that shareholders are shielded from liability for corporate debt unless the certificate of incorporation specifically imposes such liability [Petition 15]. This authority, too, is irrelevant where the certificate of incorporation establishes that no corporation existed to conduct business until after the construction contract was made and where, as a result, no corporate debt to Respondent existed from which any shareholders could be shielded.

Absent factual support for this "corporate-shield" complaint, the allegation of an unconstitutional taking of private property also fails — and with it, the balance of Petitioners' case in this Court.

Petitioners' second argument — that this Court should speak on substantive due process protection of property interests from

"arbitrary state governmental infringement" [Petition 15-17] — presumes that Petitioners' case actually concerns an arbitrary state governmental infringement. Because it patently does not, no discussion of substantive due process protection or conflict among circuit courts is called for.

The reality is that Oklahoma law was correctly and fairly applied in the trial court below. The intermediate appellate court appropriately affirmed and in the process produced a well-crafted opinion (in which all three judges concurred) that detailed the factual underpinnings of the various rulings. That same court was unconvinced by Petitioners' arguments for rehearing. And finally, all justices of the Oklahoma Supreme Court concurred in the denial of certiorari. There is simply nothing in this case that warrants this Court's review.

II.

RESPONDENT SHOULD BE AWARDED ATTORNEY FEES.

Respondent submits that he should be awarded attorney fees and costs against Petitioners and their counsel for the necessity of responding to a frivolous petition for a writ of certiorari. Sup. Ct. R. 42.2 (1997).

CONCLUSION

For the reasons provided above, the Petition should be denied and Respondent awarded attorney fees and costs.

Respectfully submitted,

ROGER L. McMILLAN
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MELISSA DELACERDA
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APPENDIX A — ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT FILED FEBRUARY 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case Number 97-1516

September 1997

National Association of Reversionary Property Owners,

Petitioner,

v.

Surface Transportation Board, et al.,

Respondents

ORDER

This case has been scheduled for oral argument on Tuesday, September 1, 1998 at 9:30 a.m. before Circuit Judges Wald, Williams and Tatel.

It is ORDERED, by the Court, *sua sponte,* that the following schedule shall apply:

Petitioner(s) Brief and Appendix	Friday, May 1, 1998
Respondent(s) Brief	Tuesday, June 2, 1998
Intervenor(s) Brief in support of Respondent	Wednesday, June 17, 1998
Petitioner(s) Reply Brief, if any	Wednesday, July 1, 1998
Oral Argument	Tuesday, September 1, 1998

Appendix A

Because the briefing schedule is keyed to the date of argument, the Court will grant requests for extension of time limits for briefs or transcripts only for extraordinarily compelling reasons.

Parties are strongly encouraged to hand deliver their briefs to the clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must utilize the most expeditious form of delivery. *See* Fed. R. App. Proc. 25(a). Briefs should be in final form. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. *See* D. C. Cir. Rule 28(a)(7).

A further order of the Court will be issued regarding the allocation of time for argument.

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Linda Jones
Deputy Clerk

Appellant Atty.:
Todd S. Brilliant
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Boston, MA 02111
617-695-3660

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case Number 97-1489

September 1997

Estate of Leon Israel, Jr., Deceased, et al.,

Appellants,

v.

Commissioner of Internal Revenue Service,

Appellee

ORDER

This case has been scheduled for oral argument on Tuesday, September 8, 1998 at 9:30 a.m. before Chief Judge Edwards and Circuit Judges Silberman and Randolph.

It is ORDERED, by the Court, *sua sponte,* that the following schedule shall apply:

Appellant(s) Brief and Appendix	Monday, May 18, 1998
Appellee(s) Brief	Wednesday, June 17, 1998
Appellant(s) Reply Brief, if any	Wednesday, July 1, 1998
Oral Argument	Tuesday, September 8, 1998

Appendix A

Because the briefing schedule is keyed to the date of argument, the Court will grant requests for extension of time limits for briefs or transcripts only for extraordinarily compelling reasons.

Parties are strongly encouraged to hand deliver their briefs to the clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must utilize the most expeditious form of delivery. *See* Fed. R. App. Proc. 25(a). Briefs should be in final form. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. *See* D. C. Cir. Rule 28(a)(7).

A further order of the Court will be issued regarding the allocation of time for argument.

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Linda Jones
Deputy Clerk

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